IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 378 OF 2021

KASIMBA AMAN SIMBA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Matogolo, J.)

dated the 11th June, 2021
in
Criminal Appeal No. 07 of 2021

.....

JUDGMENT OF THE COURT

12th & 22nd March, 2024

LILA, J.A.:

Kasimba Amani Simba, the appellant herein, was arraigned and convicted by the Resident Magistrates' Court of Iringa at Iringa (the trial court) for a sole count of unlawful possession of Government Trophies to wit, two pieces of elephant tusks contrary to sections 86 (1), (2)(c) (ii) and Part 1 of the First Schedule to the Wildlife Conservation Act No. 5 of 2009 (the WCA) read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 as amended (the EOCCA). His denial of the charge

culminated in a trial being held ending up with his conviction as charged. A sentence to serve twenty years imprisonment was meted on him. The High Court of Tanzania sitting at Iringa dismissed his first appeal, hence this second appeal.

Before the trial court, it was alleged in the charge that, the appellant, on the 2nd day of July 2018 at Mkombilenga area within Iringa Rural District in Iringa Region, was found in possession of two elephant tusks valued at 15,000 USD equivalent to TZS Thirty-three Million Eight Hundred and Twenty-Five Thousand Seven Hundred and Fifty (TZS 33,825,750.00) the property of the United Republic of Tanzania without permit from the Director of Wildlife.

The brief account of the prosecution evidence leading to the appellant's conviction and sentence came from five prosecution witnesses. They unveiled this story. A tip from a certain undisclosed informer to one Emanuel Mbaga (PW4), a Conservation Ranger who was on patrol together with D/CPL Juma Koroto (PW1), Ramadhan Onesmo Kisuga (PW2), a Conservation Ranger and Jimmy Mgaza that there was someone looking for a customer to buy government trophies, ignited the process of tracing and ultimate arrest of the appellant in possession of the government trophies. PW2, pretending to be a potential buyer, constantly communicated with the one selling the trophies who guided them to the

place where the deal would be concluded. Aboard two motor vehicles, the team arrived at a place called Mkombilenga where the seller emerged from the forest and PW2 met him and was led to the forest where that person took a sulphate bag and brought to the motor vehicle for weighing it whereat, he was arrested and he turned out to be the appellant. Upon opening the sulphate bag (exhibit P2), two pieces suspected to be elephant tusks were found which, together with the appellant, were taken to Iringa Police Station after a Seizure Certificate (exhibit P3) was prepared by PW1 and then signed by him, appellant and Emanuel Mbaga (PW4). At the police station, the two elephant tusks were handed over to one CPL Edmund, an officer in-charge of the Charge Room (CRO), for safe custody and marked IR/IR/3239/2018. The appellant's cautioned statement was recorded by F 312 D/CPL Enock Kimea (PW3) which was admitted as exhibit P5 upon an unsuccessful objection to its admissibility. One David Msovela (PW5), a Wildlife Officer stationed at Task Force (KDU) Ipogoro, was tasked with a duty to examine and established if the two pieces which were at their exhibit room/office were government trophies and he confirmed them to be elephant tusks valued at USD 15,000 equivalent to TZS 33,825,750.00 and filled a Trophy valuation Certificate which was admitted as exhibit P6. In court, the two elephant tusks were tendered by PW1 and admitted as exhibit P1.

A completely different story was presented by the appellant who testified as DW1 in his defence. He admitted staying at Mkombilenga and being there on the material date and time of his arrest, but disassociated himself with the prosecution version regarding his arrest and implication to the offence with which he was charged and convicted. According to him, he was then watching a football match between Japan and Croatia at one Rubi Regional Lweve's place/hall. A call through a phone by one Method Nyanya to go outside for a talk about an issue he had, moved him to get outside the hall to meet him. When he got out, he found Method Nyanya standing beside the road but close to a certain motor vehicle. That, as they greeted each other, he was rounded up by three armed policemen who arrested him and put him in the motor vehicle wherein he was ordered to lie face down. He was taken to Iringa Police Station and kept in the lock up. Come the next day, he was taken to KDU station where there were wires, clubs and sticks and was stained with blood which suggested that the place was special for torturing. He was undressed and left with an underpant famously known as "boxer". He was then asked if he was dealing with elephant tusks and as he denied he was tortured and was ordered by the in-charge to record his statement which he did despite his unattended lamentation that his relatives be called to witness.

Rubi Regional Lweve testified as DW2 and corroborated the appellant's assertion that the appellant was one of those who watched the football match on the material date and time but he later saw him leaving the hall while talking with his phone before the match was concluded and did not return back again.

Based on the above evidence, the Resident Magistrates' Court which tried the appellant, found the charge against the appellant proved and convicted him followed by imposition of the above shown sentence. It is noteworthy that the trial ensued before it upon a consent to try the appellant and a certificate conferring jurisdiction to try an economic case being issued. The two documents form a crux of one of the grounds of appeal before us. We shall therefore stop here. As stated above, efforts to challenge the trial court's decision bounced before the High Court.

Before us, the appellant is armed with two sets of memoranda of appeal; the first one was filed by the appellant himself on 23/12/2021 comprising seven grounds and the second is a supplementary memorandum of appeal which contained two grounds which were in the alternative. It was lodged by Mr. Jally Willy Mongo, learned advocate, who advocated for him before us. At the outset, he sought leave of the Court to abandon grounds 4, 5 and 6 of the substantive memorandum of appeal. For a reason shortly to be apparent, we find it insignificant to recite those

remaining grounds of appeal. He, likewise, abandoned the alternative ground in the supplementary memorandum of appeal thereby remaining with only one ground that runs thus: -

> *"1. The Honourable judge erred in law in upholding the decision of the trial court while the trial court lacked jurisdiction to hear and determine the case."*

It being a legal point, Mr. Mongo was minded to argue it first. His point has two limbs. First was that, in terms of section 3(1)(2) of the EOCCA, it is only the High Court sitting as an Economic Crimes Court which has mandate to try an economic case. That, any other court subordinate to the High Court can try such a case only if the Director of Public Prosecution or any State Attorney duly authorised by him certifies so in a certificate issued specifying such court in terms of section 12(3) of the EOCCA. Reverting to the instant case, it was his contention that the certificate found at page 5 of the record of appeal, certified the case to be tried by the District Court of Iringa at Iringa. To his dismay, he argued, the case was tried by the Resident Magistrates' Court of Iringa at Iringa as reflected at page 6 of the record. It lacked the requisite jurisdiction, he stressed.

The second limb of Mr. Mongo's argument was that the offence for which the Certificate and Consent mandated the subordinate court to try

was different from the offence charged. He made reference to the charge found at page 1 of the record of appeal which clearly indicated that the appellant was charged with the offence of being in unlawful possession of Government Trophies contrary to section 86(1) and (2)(c)(ii) and Part 1 of the First Schedule to the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap. 200] R. E. 2002] as amended. It was his submission that the Certificate conferring jurisdiction and Consent for trial found respectively, at pages 3 and 4, did not reflect sub-section (2)(c)(ii) of WCA as is in the charge instead, they reflected sub-section (2)(b) of WCA. Both documents disclosed that the appellant was charged for contravening the provisions of sections 86(1), (2)(b) of the Wildlife Conservation Act, No. 5 read together with Paragraph 14(d) of the First Schedule to and sections 57(1) and 60(1)(2) of the Economic and Organized Crime Act, [Cap. 200 R. E. 2002] as amended. In his view, the two documents could not be taken to have had properly clothed the trial court with the jurisdiction to try the appellant of the offence charged. Following these infractions which he treated as fatal, he urged the Court to nullify all the proceedings and judgment of the trial court as well as those of the High Court which emanated from nullity proceedings. The Court's decision in the case of

Dilipkumar Maganbai Patel vs. The Republic, Criminal Appeal No. 270 of 2019 (unreported) was cited to bolster his position.

For the respondent Republic, Mr. Tito Ambangile Mwakalinga and Ms. Winifrida Ernest Mpiwa, learned State Attorney, appeared before us and it was the latter who responded to the above appeal ground. The anomalies being so obvious on the record of appeal, she could not hold up but fully associated herself with Mr. Mongo's arguments and the prayer made.

Before we move to determine this ground of appeal, we start by reiterating the Court's position that it is of paramount importance that a court faced with a matter to adjudicate upon it should, at first, determine its mandate to hear and determine the matter before it. If satisfied that it has the mandate, it can proceed, otherwise it should refrain from adjudicating on it by rejecting it. It is for this reason, in **Tanzania Revenue Authority vs. Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009 (unreported) the Court stated that: -

> *"Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rests".*

Accordingly, this accounts for why it is permissible to question whether or not the court had jurisdiction when it presided over a matter at an appellate stage of the proceedings let alone at any stage of the proceedings by the parties. The more so, the question of jurisdiction may be canvassed at any stage even on appeal even *suo motu* by the court since it touches on the substance of a trial. (See **Tanzania Revenue Authority vs. New Musoma Textiles Ltd,** Civil Appeal No. 93 of 2009 (unreported) and **Tanzania Revenue Authority vs. Tango Transport Company Ltd** (supra).

Reverting to our instant appeal, it is clear that neither the parties nor both courts below directed their minds on the issue of jurisdiction raised by Mr. Mongo in this appeal. Indeed, having carefully studied the cited provisions of the EOCCA and examined the certificate conferring jurisdiction issued by the Senior State Attorney In-charge, we entirely agree with both Mr. Mongo and Ms. Mpiwa that it was the District Court of Iringa at Iringa which was certified to try the appellant. That certificate states: -

> ***"CERTIFICATE CONFERING JURISDICTION ON A SURBORNATE COURT TO TRY AN ECONOMIC CASE***
>
> *I,* ***ABEL M. SANGA,*** *Senior State Attorney Incharge of Iringa Region,* ***DO HEREBY,*** *in terms of Sections 12 (3) of the Economic and Organized Crime Control Act, (Cap. 200*

R.E. 2002) and GN No. 284 of 2014 ***ORDER*** *that* ***KASIMBA S/O AMANI SIMBA,*** *who is charged for contravening the provisions of Section 86 (1) & (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 read together with Paragraph 14 (4) of the First Schedule to, and sections 57 (1) and 60 (1) & (2) of Economic and Organized Crime Act, [Cap. 200 R.E. 2002] as amended by sections 16 (a) and 13 (b) respectively of the written laws (Miscellaneous Amendments) Act, No. 3 of 2016,* ***BE TRIED*** *by the District Court of Iringa at Iringa."*

But, as rightly argued by the learned counsel of the parties, the proceedings, judgment and sentence meted out are vivid that the trial of the appellant was conducted by the Resident Magistrates' Court of Iringa at Iringa which was not certified to conduct the proceedings. That was a clear violation of the certificate issued. Mr. Mongo reminded us that such a violation is not novel to the Court as in **Dilipkumar Maganbai Patel vs. The Republic** (supra), the Court faced an identical situation and it nullified the proceedings, judgments and set aside the sentence imposed and ordered a retrial. We would add another akin instance in **Ibrahim Idd Naam and Two Others vs. Republic,** Criminal Appeal No. 11 of 2021 (unreported) where the Certificate certified the Resident Magistrates' Court to try Ibrahim Idd Naam, Ramadhani Salim Ramadhani and Nassoro Hatibu Rajabu who were charged with an a economic offence

of the same nature as in the present case, but the trial was conducted by the District Court of Babati and the Court held that the latter court lacked jurisdiction. In similar vein, we hold that the Resident Magistrates' Court of Iringa lacked jurisdiction to try the case.

The second limb of Mr. Mongo's arguments seems easy to be resolved. As stated above, it is the certificate issued under section 12(3) and the consent issued under section 26(1) both of the EOCCA which, respectively, confers jurisdiction and consent to the trial of an accused by a subordinate court of an economic offence which otherwise would exclusively be tried by an Economic High Court. It would be absurd, therefore, if the two documents would not disclose the very offence the accused is charged with. This involves citing precisely in the two documents the offence with which an accused person is charged and the relevant provisions as cited in the charge. As shown above, the two documents either omitted some of the provisions appearing in the charge or cited new provisions not reflected in the charge. The offence charged and that appearing in the two documents were therefore at variance. The impropriety of the provisions cited rendered the two documents ineffectual and could not, as rightly argued by the learned counsel of the parties, thereby cloth the trial court with the requisite mandate to try the case. The trial could not therefore be validly commenced in the

subordinate court for want of jurisdiction. [See **Dilipkumar Maganbai Patel vs. The Republic** (supra)]. In both cases cited, the Court did not hesitate to accept an invitation identical to that made by Mr. Mongo to nullify the proceedings and decisions of both courts below. We share the same position and hereby proceed to nullify the proceedings and decisions of both courts below and set aside the sentence imposed.

A question that immediately knocks asking for an answer is whether or not we should order a retrial of the appellant. Mr. Mongo and Ms. Mpiwa were in agreement that we should not, giving a similar reason that there was breakage of the chain of custody in handling exhibit P1. We agree with them. While PW1 and his team said it was handed to one Edmund at Iringa Police Station, PW5 said he examined and valued it while it was at their exhibit room/office at Ipogoro. Edmund did not, for no reason, testify. Again, it was PW1 who tendered it in court. There was no explanation let alone a paper trail showing how it moved from Iringa Police Station to KDU station at Ipogoro and then who received it and later handed it to PW5 for examination so as to identify the kind of animal and evaluation. More seriously, there was no evidence showing how, again, PW1 possessed it when he tendered it in court during trial. From this state of affairs, it clearly appears it was exposed to imminent and potential danger of being interfered and tempered with such that it cannot

certainly and positively be adjudged that exhibit P1 constituted the very property seized earlier. While alive to the guidance in **Fatehal Manji vs. Republic,** [1966] E. A. 343, such breakage of chain of custody is a serious infraction affecting the credence of exhibit P1 which, if a retrial order is made, the prosecution may seize the opportunity to rectify it at the appellant's detriment.

In fine, this finding disposes the appeal without need to address other grounds. Accordingly, the appeal is allowed, conviction is quashed and the sentence imposed on the appellant is set aside. We order his release from prison forthwith if not held for another justifiable cause.

DATED at **IRINGA** this 21st day of March, 2024.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2024 in the presence of the appellant in person and Ms. Sophia Manjoti, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL